

IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

FREDERICK L. ATWATER,	)	
	)	
Plaintiff,	)	
	)	
v.	)	1:18CV866
	)	
HALEY SEAN BOONE, <sup>1</sup>	)	
	)	
Defendant.	)	

**ORDER**

This matter is before this court for review of the Memorandum Opinion and Recommendation filed on July 17, 2019, by the Magistrate Judge in accordance with 28 U.S.C. § 636(b). (Doc. 19.) In the Recommendation, the Magistrate Judge recommends that Defendant's Motion to Dismiss, (Doc. 9), be denied as moot, that Plaintiff's Motion for Leave to File an Amended Complaint, (Doc. 12), be granted, that Defendant's Motion to Dismiss Amended Complaint, (Doc. 13), be granted, and that this action be dismissed. The Recommendation was served on the parties to this action on July 17, 2019, (Doc. 20).

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<sup>1</sup> Plaintiff's Complaint was filed against former District Attorney Pat T. Nadolski whose term of office ended on December 31, 2018. Haley Sean Boone was sworn in as his successor as the elected District Attorney for Prosecutorial District 17 on January 1, 2019. Substitution is made pursuant to Fed. R. Civ. P. 25(d).

Plaintiff timely filed objections, (Docs. 21, 25), to the Recommendation.

Plaintiff also filed a motion to appoint counsel in this matter and a motion to amend his complaint. (Docs. 23, 24.) Defendant filed a response to Plaintiff's motion to amend the complaint, (Doc. 26). In light of dismissal of this action, and in the absence of exceptional circumstances, Plaintiff's motion for appointment of counsel will be denied. The court will also deny Plaintiff's motion to amend his complaint. Plaintiff seeks to substitute the State of North Carolina as Defendant in this action. However, substituting the defendant in this action would be futile as Plaintiff still fails to allege facts to establish that N.C. Gen. Stat. § 15A-269 or the post-conviction process was inadequate to vindicate the substantive rights provided.

This court is required to "make a de novo determination of those portions of the [Magistrate Judge's] report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1). This court "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the [M]agistrate [J]udge. . . . [O]r recommit the matter to the [M]agistrate [J]udge with instructions." Id.

This court has appropriately reviewed the portions of the Recommendation to which objections were made and has made a

de novo determination which is in accord with the Magistrate Judge's Recommendation. This court therefore adopts the Recommendation.

**IT IS THEREFORE ORDERED** that the Magistrate Judge's Recommendation, (Doc. 19), is **ADOPTED. IT IS THEREFORE ORDERED** that Defendant's Motion to Dismiss, (Doc. 9), is **DENIED AS MOOT**, that Plaintiff's Motion for Leave to File an Amended Complaint, (Doc. 12), is **GRANTED**, that Defendant's Motion to Dismiss Amended Complaint, (Doc. 13), is **GRANTED**, that Plaintiff's Motion for Appointment of Counsel, (Doc. 23), is **DENIED**, that Plaintiff's Motion to Amend Complaint, (Doc. 24), is **DENIED**, and that this action is dismissed.

A Judgment dismissing this action will be entered contemporaneously with this Order.

This the 10th day of September, 2019.

William L. Osburn, Jr.  
United States District Judge